93-305

Supreme Court, U.S.
FILED
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NO.

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. BLANKSTYN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. BLANKSTYN
16213 SOUTH 35TH STREET
PHOENIX, ARIZONA 85044
(602) 759-9024
Petitioner, In Propria Persona

Date: August 24, 1993

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Notice of Deficiency is sufficient when the Notice, that was given under the provisions of IRC, Section 6212(a) was not received until 383 days after the date of the Notice, due to Postal Service error in the delivery of the Notice?

2. Whether the 90-day period, provided for under the provision of IRC, Section6213(a), otherwise began to run upon actual receipt of the Notice of Deficiency, where the Notice was not received until 383 days after the date of the Notice, due to Postal Service error in the delivery of the Notice?

THE PARTIES

The only parties are those who appear in the caption of the case.

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NO.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, William C. Blankstyn, hereby Petitions this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 19, 1993.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals and the United States Tax Court were unpublished opinions and are included in the separate Appendix filed with this petition.

JURISDICTION

On March 19, 1993, the Court of Appeals for the Ninth Circuit entered its judgment (Appendix A) affirming the judgment of dismissal of the United States Tax Court (Appendix C).

On March 29, 1993, the Petitioner filed a Petition for Rehearing within the time permitted by Rule 40(a), Federal Rules of Appellate Procedure (FRAP).[1] The Court denied the Petition on June 5, 1993. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes, regulations and rules involved, are IRC, Section 6212(a) and 6213.

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1. **Rule 40. Petition for Rehearing.**
   (a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. (In Part)

Sec. 6212. Notice of Deficiency.

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Sec. 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

"Within 90 days...after a Notice of Deficiency authorized under Section 6212 is mailed...the taxpayer may file a petition with the United States Tax Court for a redetermination of the deficiency. Except as otherwise provided in Section 6851 or 6861, no assessment of a deficiency in respect of any tax..., and no levy or proceeding in Court for its collection shall be made, until such notice has been mailed,... nor until the expiration of the 90-day... period... Notwithstanding the provision of Section 7421(a), the making of an assessment or the beginning of such proceedings or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court including the Tax Court." (in part)

STATEMENT OF THE CASE AND FACTS

On or about January 2, 1990, the Petitioner received two (2) Notices of Proposed Adjustment (30-day

letter) which made proposed adjustments in income taxes due for the years 1985 and 1986. On or about April 20, 1990, the Petitioner received what purported to be a Notice of Deficiency, issued by the Director of the Ogden Service Center in the name of the Commissioner of Internal Revenue Service, dated March 26, 1990. The Notice was only for the year 1986. The Petitioner timely filed a Petition to the United States Tax Court with respect to the 1986 Notice of Deficiency. The Petitioner did not receive the Notice of Deficiency for year 1985.

On May 23, 1990, the Petitioner wrote to one Marc Garcia[2] and asked if the Notice of Deficiency for the year 1985 was going to issue, and if the Notice had issued, was it properly addressed and deposited in the mail to the Petitioner. The Petitioner received no response to this letter.

On December 23, 1990, the Petitioner, via a request under the Freedom of Information Act (FOIA), requested a copy of his Examination Administration File and other documents for the year 1985.

On or about January 7, 1991, the Petitioner received a Final Notice and Demand (Notice of Intent to Levy) from the Ogden Service Center for taxes that were alleged to have been assessed for the year 1985. On or

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2. Marc Garcia was identified as the person to contact with respect to both 30-day letters and the 1986 Notice of Deficiency.

about January 10, 1991, the Petitioner wrote to Mr. Robert Wenzel, Director, Ogden Service Center, and informed him that the Petitioner had not received the Notice of Deficiency for the year 1985.

On January 23, 1991, the Petitioner received a partial response to his FOIA request. The disclosure officer denied the request for the Examination Administration File because 1985 was involved in a law enforcement proceeding in the United States Tax Court. The Petitioner appealed the denial of the records on February 26, 1991.

On or about February 14, 1991 a Notice of Levy on Wages Salary and other income [Form 668-W(C)] was sent from the Automated Collection Branch of the Internal Revenue Service in Denver, Colorado to KPNX Broadcasting Company. KPNX did not inform the Petitioner of the Notice of Levy until March 5, 1991 as the Notice had been sent to the wrong address.

On March 13, 1991, the Petitioner telephoned Automated Collection in Denver. He discussed the matter with a Mrs. Sexton. She suggested that the Petitioner go to the local Phoenix District Office and discuss the problem with someone there. On March 15, 1991, the Petitioner went to the Phoenix Office and talked with a Mel Stewart. He showed Mr. Stewart the correspondence, the FOIA and the response to the request.

Mr. Stewart contacted Ogden and told the Petitioner that the Notice of Deficiency had issued and that it was in the "Audit File." Mr. Stewart told the Petitioner, that because he had allegedly failed to file his returns for 1989 and 1990, that neither he nor the Collections Department would take any action to remove the Notice of Levy that had been served upon KPNX.

On March 18, 1991, the Petitioner discussed the matter with Mark Ashby, Assistant United States Attorney, District of Arizona. Mr. Ashby suggested that the Petitioner discuss the matter with the Assistant District Counsel that was handling the Petition to the United States Tax Court for the 1986 Notice of Deficiency.

On March 19 and 20, 1991, the Petitioner called and talked with Mr. Andrew J. Horning in the district Counsel's Office. He told the Petitioner to bring copies of all of the documents and he would see what he could do. On March 21, 1991, the Petitioner took the documents to Mr. Horning under a cover letter which outlined the matter for him. The letter also informed him that if he would not have the IRS voluntarily restrain themselves from levying upon the Petitioner's property by 9:00 AM, March 22, 1991, an action seeking a permanent injunction would be filed accompanied by an application for a temporary restraining order.

On March 22, 1991, the Petitioner again called Assistant United States Attorney, Mark Ashby. He was

referred to Assistant United States Attorney Janet Patterson as Mr. Ashby was out of town. The Petitioner told Ms. Patterson that district Counsel would not have the IRS voluntarily restrain themselves. The Petitioner also gave her verbal notice that he would seek a Temporary Restraining Order without further Notice to the United States Attorney's Office.

Later that same day, the Petitioner again called Mr. Horning. Mr. Horning told the Petitioner that the envelope, with the 1985 Notice of Deficiency still in it, had been found. The envelope was unopened and had been returned by the Postal Service marked "unclaimed." Mr. Horning told the Petitioner that his problem was with the Postal Service and not the IRS.

On March 25, 1991, the Petitioner filed a complaint in the United States District Court for the District of Arizona seeking a temporary restraining order, a preliminary injunction and a permanent injunction to enjoin the Respondent from levying on the Petitioner's property to collect taxes alleged to have been assessed for 1985.

The action was captioned *Blankstyn v. United States*, CIV 91-0452 PHX CAM.[3] The Petitioner invoked the jurisdiction of the district Court in that action

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3. A Petition for a Writ of Certiorari in that action was recently mailed to this Court on Thursday, August 5, 1993.

pursuant to the provisions of 28 USC, Sections 1331, 1340 and 1346 and IRC Sections 6213(a) and 7431.

On March 26, 1991, the district Court denied the Petitioner's application for the Temporary Restraining Order, and set a hearing for April 19, 1991 on the Petitioner's Motion for a Preliminary Injunction. On April 13, 1991, the Petitioner received a response from the Defendant United States to his Motion for Preliminary Injunction. Attached to the United States' response was a copy of the Notice of Deficiency for 1985.

On July 10, 1991, the Petitioner filed a Petition to the United States Tax Court. Although July 10, 1991 was 471 days from the March 26, 1990 date of the Notice, it was only the 88th day after the Petitioner actually received the Notice.

On January 31, 1992, the Court entered its Order of Dismissal and Decision. (Appendix C). On March 27, 1992, the Petitioner filed a Motion to Vacate or Revise Decision. On April 29, 1992, the Tax Court denied the Motion. (Appendix D).

On July 20, 1992, the Petitioner appealed. On March 19, 1993, the Ninth Circuit issued its memorandum affirming the dismissal and judgment of the Tax Court. On March 29, 1993, the Petitioner filed a Petition for rehearing which was denied on June 4, 1993.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WHICH FOUND THAT THE NOTICE OF DEFICIENCY WAS SUFFICIENT, WHEN EVIDENCE SHOWED THAT THE NOTICE WAS NOT RECEIVED DUE TO POSTAL SERVICE ERROR IN DELIVERY OF THE NOTICE, IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS' OF APPEAL

The Appellate Court found that the because the evidence showed that the Notice of Deficiency was 'mailed' that the provisions of IRC, Sections 6212 and 6213 had been complied with. (See Appendix A, Page 3). The Appellate Court's decision failed to consider the Petitioner's uncontroverted affidavit that showed that the Petitioner's non-receipt of the Notice was caused by circumstances beyond the control of the Petitioner. (See Appendix E, Paragraphs 23, 24 and 25)

The affidavit and evidence attached thereto[4] showed that it was the Postal Service that mishandled the 1985 Notice, resulting in Petitioner's non-receipt. The affidavit and evidence shows that even though Petitioner did receive the Notice of Deficiency for 1986, which had

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4. See Exhibit M at Page A-27 of the Appendix

been mailed on the same date[5] as the 1985 Notice, Postal Service records showed that the 1986 Notice had also been returned "unclaimed", the same condition the Postal Service claimed in the return of the 1985 Notice.

In failing to consider this uncontroverted affidavit the Appellate Court ignored decisions from other circuits that had held that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayers due to error of the Postal Service the notice shall be found to be insufficient." *Powell v. C.I.R.*, 958 F.2d 53, 58 (4th Cir., 1992); *McPartlin v. United States*, 653 F.2d 1185, 1191 (7th Cir., (1981). See also *Keado v. United States*, 853 F.2d 1209, 1212 n.9 (5th Cir., 1984) (Claim of non-receipt of Notice of Deficiency by Keado's may have been considered had they filed a Petition to Tax Court within 90 days after becoming aware of the Notice of Deficiency).

In *Powell*, supra, the Commissioner petitioned this Court for a Writ of Certiorari. Despite the Commissioner's ***dire warning*** that the Fourth Circuit's ruling would "seriously impede the ability of the United States to collect taxes from the vast numbers of taxpayers who change their places of residence..." this Court denied certiorari to the Commissioner on November 2, 1992.

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5. March 26, 1990.

See *Commissioner of Internal Revenue v. Powell,* 121 L.Ed.2d 359, 113 S.Ct. 440 (1992).

Even the Tax Court ignored its own precedence that notice is insufficient when evidence shows that non-receipt of the Notice was the result of Postal Service error. *Pyo v. Commissioner,* 83 TC 626, 639 (1984); *Mulvania v. Commissioner,* 81 TC 65, 70 (1983) ["If mailing ***does not*** result in **actual** notice of a tax deficiency, because 'the notice is sent to the wrong address and never delivered, ***or delivered with prejudicial delay,*** **the statutory purpose is not served** and it would be **manifestly unfair** to deny the taxpayer his prepayment hearing.'" (emphasis added)]. See also *Estate of McKaig v. Commissioner,* 51 TC 331 (1968). The Petitioner submits that his uncontroverted Affidavit shows that the non-receipt of the Notice was caused by the Postal Service and that the 90-day period to Petition the United States Tax Court did not begin, if it were to begin to run at all, until he actually received the notice.

At no time did the Tax Court or the appellate Court address the Petitioner's uncontroverted affidavit or otherwise attempt to distinguish the circumstances of this case from the circumstances in the above cited authorities. The appellate Court refused to address whether the Petitioner's non-receipt of the Notice of Deficiency was beyond the control of the Petitioner. As a result of the Ninth Circuit's judgment in this case it has placed itself

in conflict with *Powell*, and *McPartlin*, supra, and the Tax Court.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

II. THE FAILURE OF THE TAX COURT AND APPELLATE COURT TO CONSIDER THAT THE 90-DAY PERIOD FOR PETITIONING THE UNITED STATES TAX COURT BEGAN UPON THE PETITIONER'S ACTUAL RECEIPT OF THE NOTICE OF DEFICIENCY IS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

It is clear from Argument I above, that other than this case, the Courts have only addressed the issue of Postal Service mishandling of the Notice of Deficiency six times. Three at the appellate level and three in the Tax Court itself. Of the six cases cited above only *Keado*, supra, broached the subject concerning whether the 90-day period would begin to run after actual notice.

The Tax Court and one appellate Court has found that 90-day period begins to run upon actual receipt, and not when mailed, but in both cases the Notice was actually received or the taxpayer otherwise became aware of the Notice within 90-days of the date the Notice

issued. *Tenzer v. C.I.R.*, 285 F.2d 956 (9th Cir., 1960); *Zaun v. Commissioner*, 62 TC 278 (1974).

The circumstances involved in this case occur infrequently. As noted in Argument **I**, the Ninth Circuit is the only circuit that has taken a position opposite the other circuits when faced with similar circumstances. And they did it in this case. No court has decided that the 90-day period begins to run if Postal Service mishandling delays receipt of the Notice.

If this Court should find that the Notice was sufficient, it should find such only to the extent that the 90-day period began to run upon the Petitioner's actual receipt of the Notice. Because the circumstances involved in this Case occur so infrequently, this Court should decide the matter now to avoid any confusion in the future in the appellate and trial Courts (Tax Court included).

Finding that the 90-day period began to run after the Petitioner's actual receipt of the Notice on April 13, 1991, means the Petitioner's July 10, 1991 Tax Court Petition was timely and the Tax Court had jurisdiction. As such the prohibition under IRC, Sec. 6213 regarding assessment and collection would apply to the 1985 taxes.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

Either the 1985 Notice of Deficiency was insufficient due to the Postal Services mishandling of it, or the 90-day period began to run upon the Petitioners actual receipt of the Notice. If the Notice was insufficient then the Tax Court did not have jurisdiction, the Deficiency could not be assessed and the respondent should be required to issue a new Notice.

If the Notice of Deficiency is sufficient it should only be so to the extent that the 90-day period began to run upon the Petitioner's actual receipt of the Notice. This means that the Petitioner's Petition to the United States Tax Court was timely.

Accordingly, and for the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 24th day of August, 1993.

WILLIAM C. BLANKSTYN
16213 South 35th Street
Phoenix, Arizona 85044
(602) 759-9024
Petitioner, In Propria Persona

NO.

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX

WILLIAM C. BLANKSTYN
16213 SOUTH 35TH STREET
PHOENIX, ARIZONA 85044
(602) 759-9024
Petitioner, In Propria Persona

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED MAR 19 1993

BILL BLANKSTYN,	)	No. 92-70545
	)	
Petitioner-Appellant	)	Tax Ct.No.
	)	15653-91
v.	)	
	)	
COMMISSIONER INTERNAL REVENUE SERVICE,	)	MEMORANDUM*
	)	
Respondent-Appellee	)	
	)	

Appeal from the United States Tax Court

Submitted March 10, 1993**

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Bill Blankstyn appeals pro se the tax court's dismissal of his petition for redetermination of a tax deficiency for the tax year 1985. The tax court found that it lacked jurisdiction to consider the petition because Blankstyn filed it more than 90 days after the mailing of the notice of deficiency. We have jurisdiction pursuant to 26 U.S.C. 7482. We review de novo, Scar v. Commissioner, 814 F.2d 1363, 1366 (9th Cir. 1987), and affirm.

Section 6212(a) of the Internal Revenue Code states in part: "If the Secretary determines that there is a deficiency in respect of any tax imposed ... he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." 26 U.S.C. 6212(a). Section 6213(a) provides in part: "Within 90 days ... after the notice of deficiency authorized in section 6212 is mailed ... the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." 26 U.S.C. 6213(a). The timely filing of a valid petition for redetermination is jurisdictional. Scar, 814 F.2d at 1366.

Here, the Commissioner mailed a valid notice of deficiency to Blankstyn at his last known address by certified mail on March 26, 1990. The 90-day period within which to file a petition for redetermination expired on June 26, 1990. See 26 U.S.C. 6213(a). Blankstyn

filed his petition for redetermination on July 15, 1991, well beyond the expiration of the 90-day period.

Blankstyn contends that the 90-day period for filing his petition did not commence until he received the notice of deficiency on April 13, 1991, and therefore that his petition was timely filed. This contention lacks merit. The statute clearly states that the petition must be filed "[w]ithin 90 days ... after the notice of deficiency ... is mailed." 26 U.S.C. 6213(a) (emphasis added). Furthermore, this court has consistently held that the mailing of the notice of deficiency commences the 90-day period. See King v. Commissioner, 857 F.2d 676, 679 (9th Cir. 1988) (notices of deficiency are valid and begin running the limitation period upon mailing, regardless of when or if they are received); United States v. Zolla, 724 F.2d 808, 810 (9th Cir.) (same), cert. denied, 469 U.S. 830 (1984); Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982) (same). Thus, the tax court correctly found that it did not have jurisdiction to consider Blankstyn's untimely petition. See Scar, 814 F.2d at 1366.

AFFIRMED.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JUN - 4 1993

BILL BLANKSTYN,	)	No. 92-70545
	)	
Petitioner-Appellant	)	Tax Ct.No.
	)	15653-91
v.	)	
	)	
COMMISSIONER INTERNAL REVENUE SERVICE,	)	ORDER
	)	
Respondent-Appellee	)	
	)	

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges.

Appellant's petition for rehearing is denied.

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APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

BILL BLANKSTYN	)	
	)	
Petitioner	)	
	)	
v.	)	
	)	
COMMISSIONER INTERNAL REVENUE	)	Docket No. 15653-91
	)	
Respondent	)	
	)	

ORDER AND ORDER OF DISMISSAL
FOR LACK OF JURISDICTION

On August 19, 1991, respondent filed a Motion to Dismiss for Lack of Jurisdiction on the ground the petition was not filed within the time prescribed by the applicable provisions of the Internal Revenue Code. Respondent attached to his motion a copy of the Certified Mail List, as evidence of the fact that the notice of deficiency was sent to petitioner by certified mail on March 26, 1990.

The petition was filed with the Court on July 15, 1991, which date is 476 days after the mailing of the notice of deficiency. The envelope in which the petition was mailed to the Court bears a United States postmark

of July 10, 1991, which date is 471 days after the mailing of the notice of deficiency.

This Court is a court of limited jurisdiction. It may exercise jurisdiction only to the extent expressly provided by statute. In a deficiency case the jurisdiction of the Court depends on (1) the issuance by the Commissioner of a notice of deficiency and (2) the filing of a petition by the taxpayer with the Court within 90 days (or 150 days if the notice is addressed to a person outside the United States) after the notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day).

In the present case the 90-day period for filing a petition with this Court expired on June 25, 1990. However, the petition was not filed within that 90-day period.

Petitioner was served with a copy of respondent's Motion to Dismiss for Lack of Jurisdiction and given the opportunity to file a notice of objection. On November 26, 1991, petitioner filed a response to respondent's motion. Respondent on January 22, 1992, filed a reply to petitioner's response. Petitioner alleges that the notice of deficiency, which was sent by certified mail on March 26, 1990, was not received by him. The record reflects that the notice of deficiency was mailed to petitioner's last known address on March 26, 1990, in accordance with the provisions of the Internal Revenue Code. This Court

has held that if a notice of deficiency is sent to the taxpayer in accordance with the applicable provisions of the Internal Revenue Code, there is no requirement that the taxpayer actually receive it. See Pyo v. Commissioner, 83 T.C. 626, 632-633 (1984). There is nothing in the record to indicate that the notice of deficiency was improperly mailed to petitioner.

The premises considered, it is

ORDERED that petitioner's Motion for Hearing filed November 26, 1991, is denied. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction is granted, and this case is dismissed for lack of jurisdiction.

(signed)
{signature unreadable}
Chief Judge

Entered: Jan 31 1992

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APPENDIX D

Bill Blankstyn
c/o 16213 South 35th Street
Phoenix, Arizona 85044

Petitioner, Sui Juris

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

BILL BLANKSTYN Petitioner v. COMMISSIONER INTERNAL REVENUE Respondent	)	Docket No. 15653-91

ORDER

This case was dismissed for lack of jurisdiction by Order and Order of Dismissal entered January 31, 1992, on the ground the petition was not timely.

On April 28, 1992, petitioner filed a Motion to Vacate or Revise decision and a Memorandum of Points and Authorities in Support of Motion to Vacate or Revise Decision. Therein petitioner contends the notice of deficiency upon which this case is based is invalid due to mishandling by the United States Postal Service.

Petitioner does not dispute the existence of the notice of deficiency or that respondent correctly addressed the notice of deficiency to petitioner's last known address. Rather, petitioner's position is that the notice should not be treated as mailed pursuant to I.R.C. Section 6212 since the notice of deficiency was not delivered by the postal service.

Section 6212 authorizes respondent to send the notice of deficiency by certified mail, and further provides that if the notice is mailed to the taxpayer at his last known address the notice "shall be sufficient." Pursuant to section 6213(a) the petition must be filed with this Court within 90 days after the statutory notice of deficiency is mailed to the taxpayer. This Court does not acquire jurisdiction unless the petition is filed within the 90-day period. However, the Court will not dismiss a petition as untimely unless respondent first establishes that she mailed the notice of deficiency and proves the date of mailing. Pietanza v. Commissioner, 92 T.C. 729, 736 (1989); August v. Commissioner, 54 T.C. 1535 (1970). Where the existence of the notice of deficiency is not in dispute, the Court will accept a properly completed certified mail list as proof of the date of mailing of the notice of deficiency by respondent. See Cataldo v. Commissioner, 60 T.C, 522, 524 (1973); cf. Pietanza v. Commissioner, supra.

In this case the existence of the notice of deficiency is not in dispute. A complete copy of the notice is attached to the petition commencing this case which indicates that it was mailed on March 26, 1990. The record contains a copy of respondent's certified mail list, Form 3624, as proof that the notice was mailed on March 26, 1990. A United States Postal Service postmark dated March 26, 1990, is clearly stamped on the form 3624. In addition, the form bears the initials of a postal service employee indicating that the notice of deficiency was accepted by the postal service on that date. The notice of deficiency and the Form 3624 each bear petitioner's last known address, 16213 S. 35th Street, Phoenix, Arizona 85044-7249.

On this record the Court is satisfied that respondent properly mailed the notice of deficiency by certified mail on March 26, 1990, to petitioner's last known address. It is well settled that a notice of deficiency mailed to the taxpayer's last known address is valid for all purposes whether or not the taxpayer actually receives it. Frieling v. Commissioner, 81 T.C. 42,48, 52 (1983). Respondent has established by competent proof that the notice was properly mailed to petitioner's last known address. As such, she has done all that is required by 6212 for the issuance of a valid notice of deficiency. Petitioner's allegation that the postal service mishandled the notice of deficiency is not a basis for

invalidating the notice of deficiency. The statute simply does not require delivery or actual receipt of the notice of deficiency and , in effect, the statute places the risk of nondelivery on the taxpayer. See Monge v. Commissioner, 93 T.C. 22, 33 (1989),

Upon due consideration, it is

ORDERED that petitioner's motion to vacate filed April 28, 1992, is denied.

(Signed) Arthur L. Nims, III
Chief Judge

Dated: Washington D.C.
April 29, 1992

APPENDIX E

Bill Blankstyn
c/o 16213 South 35th Street
Phoenix, Arizona 85044

Petitioner, Sui Juris

UNITED STATES TAX COURT

BILL BLANKSTYN	)	
	)	
Petitioner	)	DECLARATION OF WILLIAM C. BLANKSTYN
	)	
v.	)	
	)	
COMMISSIONER INTERNAL REVENUE	)	No. 15653-91
	)	
Respondent	)	
	)	

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I, William C. Blankstyn, state as follows that:

1. I am the petitioner in the above captioned cause and I am competent to testify about the matters set forth below.

2. On or about January 2, 1990, I received two (2) Notice of Proposed Adjustments (30-day Letter) for the years 1985 and 1986. (Exhibits A and B)

3. On or about April 20, 1990, I received what purported to be a Notice of Deficiency for the year 1986 dated March 26, 1990 (Exhibit C).

4. I timely petitioned the Tax Court for the year 1986. The action is currently pending in the Tax Court at Docket Number 13881-90.

5. I did not receive a Notice of Deficiency for the year 1985.

6. On or about May 23, 1990, I wrote to Marc Garcia and asked him if a Notice of Deficiency was going to issue for 1985 and if it had issued why had I not received it. (Exhibit D)

7. On December 23, 1990, I requested my Examination Administration File and other documents, under the Freedom of Information Act (FOIA), for the year 1985. (Exhibit E)

8. On or about January 7, 1991, I received a Final Notice and Demand (Notice of Intent to Levy) from the Ogden Service Center for taxes alleged to have been assessed for the year 1985. (Exhibit F)

9. On or about January 10, 1991, I wrote to Mr. Robert Wenzel, Director, Ogden Service Center. The letter informed him and his office that I had not received the Notice of Deficiency for the year 1985, (Exhibit G)

10. On January 23, 1991, I received a partial response to my FOIA request. My request for the Examination Administrative File was denied because the year 1985 was involved in a law enforcement proceeding in the United States Tax Court. (Exhibit H)

11. On or about February 14, 1991, a Notice of Levy on Wages, Salary, and Other Income [Form 668-W(C)] was sent from Automated Collection in Denver, Colorado to KPNX Broadcasting Company (Exhibit I). I was not informed by KPNX of the Notice of Levy until March 5, 1991 as the Notice of Levy was sent to the wrong company address.

12. On February 26, 1991, I appealed the denial of the Examination Administrative file. (Exhibit J)

13. On March 8, 1991, I received a response to my appeal that an answer to the appeal will be due on or before April 1, 1991 (Exhibit K). The appeal on the FOIA is still pending and I have not received any documents or further response on appeal.

14. On March 13, 1991, I phoned Automated Collection in Denver. I discussed the matter with a Mrs. Sexton. She suggested that I go to the local Phoenix District Office and discuss the problem with someone there.

15. On March 15, 1991, I went to the Phoenix Office. I discussed the matter with a Mel Stewart and showed

him the correspondence with respect to the FOIA request and appeal. He was instructed by someone in collections not to take any action and let it remain at status quo.

16. On March 18, 1991, I discussed the matter with Assistant United States Attorney, Mark Ashby. He suggested I discuss the matter with the Assistant District Counsel who was handling my Petition for 1986.

17. On March 19 and 20, 1991, I talked with attorney Andrew J. Horning in the District Counsel Office. He told me to bring the documents in and he would se what he could do.

18. On March 21, 1991, I took the documents to Mr. Horning. Attached was a cover letter which outlined the matter for him. (Exhibit L). I also informed him that if he would not have the Internal Revenue Service voluntarily restrain themselves by 9:00 AM, March 22, 1991, that I would file the appropriate action in the district Court and I would seek a Temporary Restraining Order without further Notice to him.

19. On March 22, 1991, I again called Assistant United States Attorney Mark Ashby. I was referred to Assistant United States Attorney Janet Patterson as Mr. Ashby was out of town. I told her the Assistant District Counsel would not have the IRS voluntarily restrain themselves. I also told her that the phone was my Notice that I

would be seeking a Temporary Restraining Order without further notice to the United States Attorney's Office.

20. On March 22, 1991, I again called Mr. Horning. He stated that the envelope had been found in the Ogden Service Center. The envelope was returned unopened and market "unclaimed." He stated that my problem was with the United States Postal Service and not the Internal Revenue Service.

21. On March 25, 1991, I filed an action for a Permanent Injunction and Unauthorized Disclosure of Return and Return Information, in the United States District Court, In the District of the State of Arizona. BLANKSTYN v. UNITED STATES, CIV 91-0452 PHX CAM.

22. On April 13, 1991, the United States responded to the Motion for a Preliminary Injunction I sought in that case. Attached to the response was the Notice of Deficiency alleged to have been issued for the year 1985. This was the first time I had seen this Notice.

23. On April 15, 1991, I went to the Main Postal Center at 48th Street and Van Buren, in Phoenix, Arizona. I requested and on April 18, 1991, I received certified copies of the Delivery Notice/Reminder/Receipt Forms (PS Form 3849) ("Receipts") for Certified Mail Numbers P

904 487 456 and P 904 487 457 from Ronald C. Abalos (Exhibit M).

24. These are the certified mail numbers for the Notices of Deficiency issued for the years 1985 and 1986 respectively.

25. Both Receipts indicate that both of the Notices of Deficiency were returned to the Internal Revenue Service in Ogden, Utah on April 14, 1990. As I already stated above I received the Notice of Deficiency for 1986, which was sent by Certified Mail Number P 904 487 457.

26. On April 19, 1991, a hearing on the Preliminary Injunction was held. At the end of the hearing Judge Mueke granted me a Preliminary Injunction. The Court further ordered the Parties to submit supplemental memorandums to determine whether the actual Notice standards had been met for the running of the ninety (90) day time period for petitioning Tax Court.

27. The parties submitted their supplemental memorandums and on April 30, 1991, Judge Mueke dismissed the action.

28. I timely filed a Motion for a New Trial or in the Alternative to Alter or Amend Judgment. The Court denied the Motion on July 24, 1991. The matter has now been Appealed to the Ninth Circuit Court of Appeals and is now in the initial states of preparing the record.

Appeals and is now in the initial states of preparing the record.

29. As the record in this Petition indicates, I filed the Petition for Redetermination of the Deficiency on or before July 10, 1991, which is within the ninety (90) days since I had actual knowledge of the Notice of Deficiency. I filed an Amended Petition on August 2, 1991.

I, William C. Blankstyn, declare under penalty of perjury, under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 17th day of October, 1991, in Maricopa County, Arizona.

_____

William C. Blankstyn

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E X H I B I T D

William C. Blankstyn
16213 S. 35th Street
Phoenix, Arizona 85044

May 20, 1990

Internal Revenue Service Center
Southwest Region
Attn: ACS/SFR M/S 5507
P.O. Box 9949
Ogden, Utah 84409

Dear Mr. Marc Garcia:

Your letter dated 5 May 1990 which was in response to my letter dated 24 April 1990 is insufficient because you did not answer my question raised in my letter. I'll repeat my question: Your notice did not state what Section of the Internal Revenue Service Code makes me **liable** for income taxes as shown in the NOTICE OF DEFICIENCY. Under what authority am I held liable?

I am willing to immediately pay the Federal government any tax that the law authorizes the government to legally assess and for which the law establishes a liability (without the government having to expend any further time or energy or use any form of coercion such as a levy, lien, court order or tax court proceeding). Just show me your authority for assessing such a tax and the Code Section that makes me liable

for paying it. IRC Section 6020 and Section 6212 which you cited in your reply, imposes no liability, obligation, or requirement on anyone to file an income tax return. It requires no liability from me. For the government to contend that I am liable for a tax that has never been assessed is **fraud.**

In addition, Code Section 6201 (a)(2) authorizes the Secretary "to estimate the amount of tax which **has been omitted to be paid by stamp** and to make assessment thereon upon the person or persons the Secretary determines to be liable for such tax". Where in Chapter 63 is there any provision for the Secretary to estimate and assess any taxes other than those required **to be paid by stamp?**

Internal Revenue Code Sections 3403, 4401 (c), 5005, and 5703 (a), for example, clearly establish liabilities for various Federal Taxes. To establish, therefore, my liability for the alleged "deficiency", please furnish me with a copy of the Internal Revenue Code section(s) that establishes a "liability" for the income taxes referred to in your letter and underline the word(s) "liability" and/or "liable" where it appears *within the body of the law.* I do not need to waste my time nor seek expensive legal counsel to challenge a *suggestion* that I owe a tax for which *no liability* exists in the Code.

Also, no where in your letter is there any certification by any responsible government official that I am liable

for the tax, nor is there any clear demand that I pay such tax. If, therefore, the government does not furnish me with the Code section(s) described above, I will consider the matter closed and regard any further correspondence relative to it as erroneous.

I also would like to know why I have received a 30-day letter for both 1985 and 1986 taxes dated January 2, 1990, but have only received a Notice of Deficiency for the 1986 tax year. Has a Notice of Deficiency been issued for 1985? IRS Publication No. 1 (THE TAXPAYER BILL OF RIGHTS) states, "Our goal at the IRS is to protect your rights..." You are not "protecting" my rights, but attempting to violate them.

Sincerely,

William C. Blankstyn

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E X H I B I T M

UNITED STATES POSTAL SERVICE

April 18, 1991

William Blankstyn
16213 S. 35th Street
Phoenix, Arizona 85044-7249

Dear Mr. Blankstyn:

This letter is in response to your recent telephone conversation with Consumer Affairs Associate Jo Gervasio concerning the delivery records of two certified letters from the Department of Internal Revenue.
Ms. Gervasio search our files and the two certified letters, P904487456 and P904487457, were returned to the Department of Internal Revenue on April 20, 1990. The endorsement given was "unclaimed."

Enclosed are copies of the delivery record showing when the letters were returned.

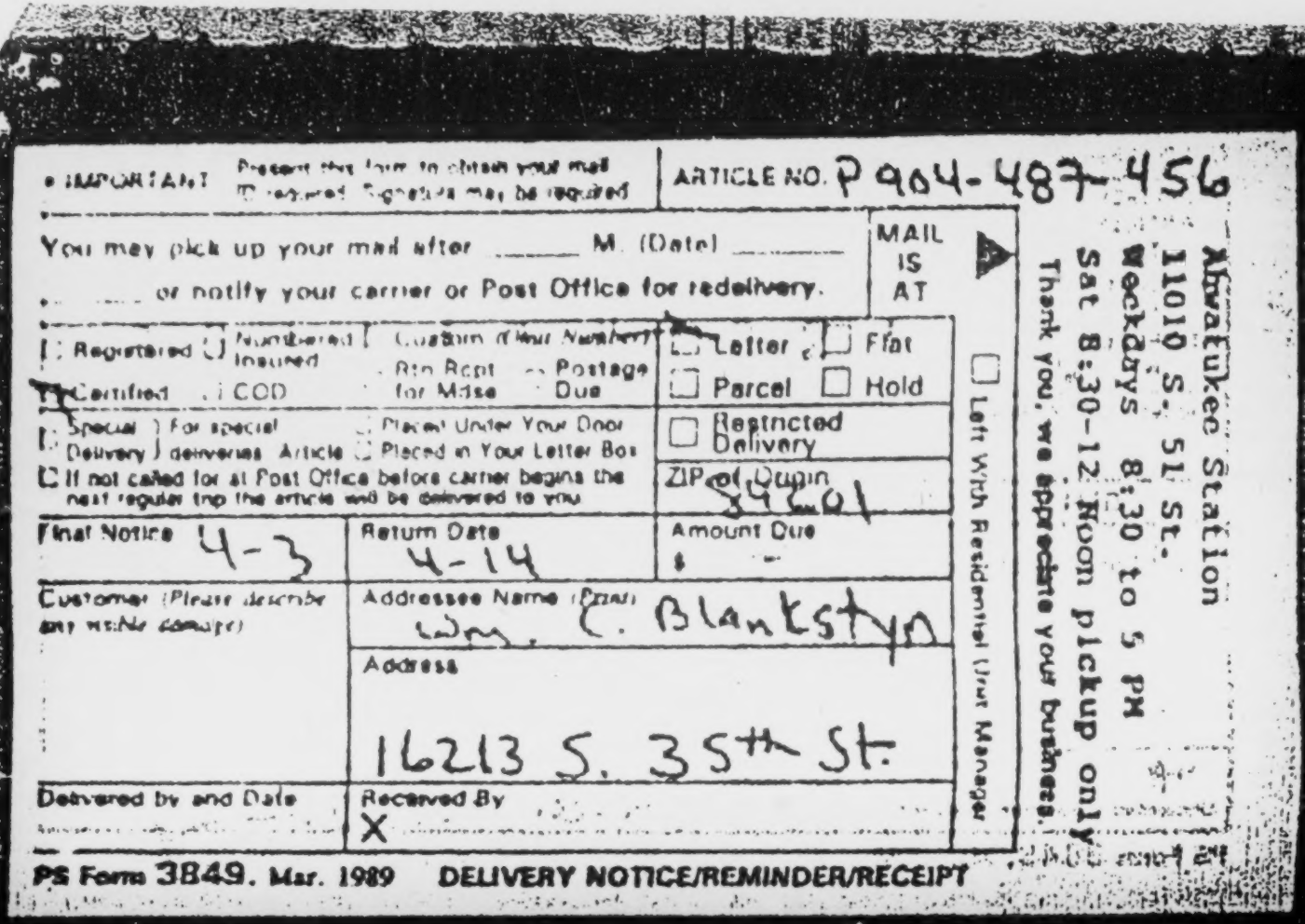
Thank you for the opportunity to be of assistance.

Sincerely,

Ronald C. Abalos, Field Director
Marketing and Communications
Phoenix Division
Phoenix AZ 85026-9996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.



• IMPORTANT Present this form to obtain your mail. If required, signature may be required.

ARTICLE NO. P 904-487-456

You may pick up your mail after ____ M. (Date) ____

____ or notify your carrier or Post Office for redelivery.

MAIL IS AT

Milwaukee Station
11010 S. 51 St.
Weekdays 8:30 to 5 PM
Sat 8:30-12 Noon pickup only
Thank you, we appreciate your business.

☐ Registered ☐ Numbered Insured ☐ Custom (Mail Number) ☐ Letter ☐ Flat
☐ Certified ☐ COD ☐ Rtn Rcpt for Misc ☐ Postage Due ☐ Parcel ☐ Hold

☐ Special Delivery ☐ For special deliveries Article ☐ Placed Under Your Door ☐ Placed in Your Letter Box ☐ Restricted Delivery

☐ If not called for at Post Office before carrier begins the next regular trip the article will be delivered to you

ZIP of Origin 53201

Final Notice 4-3

Return Date 4-14

Amount Due $ -

Customer (Please describe any visible damage)

Addressee Name (Print) Wm. C. Blankstyn

Address 16213 S. 35th St.

☐ Left With Resident (Not Manager)

Delivered by and Date

Received By X

PS Form 3849, Mar. 1989 DELIVERY NOTICE/REMINDER/RECEIPT

COD Charges

Address Fee

DELIVER ARTICLE TO

FORWARDED TO ADDRESSEE AT

Enter New Address to Which Mail is to Be Sent

Signature of Addressee or Agent

OFFICE RECORD OF DISPOSITION WHEN DELIVERY [illegible] MADE

☐ Forwarded to Addressee — Returned to Sender (Show

IRS
Ogden, Ut. 84

☐ Unclaimed ☐ Refused ☐ Other (Specify) | Date 4-20 | By (Sign)

PS Form 3849, Mar. 1989

• IMPORTANT: Present this form to obtain your mail. ☐ required. Signature may be required.

ARTICLE NO. P904-487-45

You may pick up your mail after _____ M. (Date) _____

_____ or notify your carrier or Post Office for redelivery.

MAIL IS AT

Abvatukee Station
11010 S. 51 St.
Weekdays 8:30 to 5 PM
Sat 8:30-12 Noon pickup only
Thank you, we appreciate your business.

☐ Registered ☐ Numbered Insured ☐ Custom (Omit Number) ☐ Letter ☐ Flat

☐ Certified ☐ COD ☐ Rtn Rcpt for Mdse ☐ Postage Due ☐ Parcel ☐ Hold

☐ Special Delivery } For special deliveries. Article ☐ Placed Under Your Door ☐ Placed in Your Letter Box. ☐ Restricted Delivery

☐ If not called for at Post Office before carrier begins the next regular trip the article will be delivered to you.

Zip of Origin 94201

☐ Left With Residential Unit Manager

Final Notice 4-3	Return Date 4-14	Amount Due $ -
Customer (Please describe any visible damage)	Addressee Name (Print) Wm. C. Blankstip	
	Address 16213 S. 35th St.	
Delivered by and Date	Received By X	

PS Form 3849, Mar. 1989 DELIVERY NOTICE/REMINDER/RECEIPT

C.O.D. Charges | Article No.

DELIVER ARTICLE TO ▶	Enter Name of Person you Authorize to Receive the Ma
FORWARD TO ADDRESSEE AT ▶	Enter Full Address to Which Mail is to be Sent
Signature of Addressee or Agent	

OFFICE RECORD OF DISPOSITION WHEN DELIVERY C[illegible] MADE

☐ Forwarded to Addressee ⟶ ☐ Returned to Sender (Name [illegible])

IRS
Ogden. Utah

☑ Delivered ☐ Business Reflect ☐ ☐ Other (Specify)	Date 4-20	By (Sign) C.[illegible]

PS Form 3849, Mar. 1969 [illegible]

Supreme Court, U.S.
FILED
OCT 27 1993
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(2)

No. 93-305

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. BLANKSTYN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
MICHAEL L. PAUP
Acting Assistant Attorney General
DAVID ENGLISH CARMACK
ANDREA R. TEBBETS
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BEST AVAILABLE COPY

12 pp

QUESTION PRESENTED

Whether a notice of deficiency mailed by the Internal Revenue Service to the taxpayer's last known address (pursuant to Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212), but which is allegedly not received by the taxpayer due to Postal Service error, commences the 90-day period provided by Section 6213 of the Code, 26 U.S.C. 6213, within which the taxpayer may file a petition in the Tax Court for redetermination of the deficiency.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A3) and the Tax Court (Pet. App. A7-A9, A11-A14) are unreported. The decision of the court of appeals is noted at 990 F.2d 1255 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A3) was entered on March 19, 1993. The petition for rehearing was denied on June 4, 1993. Pet. App. A5. The petition for a writ of certiorari was filed on August 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 26, 1990, the Internal Revenue Service (IRS) mailed petitioner a notice of deficiency for his 1985 federal income taxes (Pet. App. A2, A8, A13). The notice was mailed by certified mail to petitioner's last known address (*ibid.*). Petitioner alleges that he did not receive the notice because it was mishandled by the Postal Service (*id.* at A8, A11).

After the United States assessed petitioner's taxes for 1985, petitioner brought suit in district court seeking to enjoin the IRS from levying on his property or otherwise seeking collection of the assessment. The district court rejected petitioner's request for injunctive relief, and the court of appeals affirmed. The decision in that case is now pending on petition for writ of certiorari. *Blankstyn* v. *United States*, No. 93-209.

2. On July 15, 1991, petitioner filed a petition in the Tax Court to obtain a redetermination of the 1985 deficiency. The Tax Court dismissed the petition for lack of jurisdiction. The court ruled (Pet. App. A8-A9) that the notice of deficiency had been properly mailed by certified mail to petitioner's last known address and that petitioner had failed to file his petition within 90 days of the mailing of the notice, as required by Section 6213(a) of the Code, 26 U.S.C. 6213(a). The court concluded that a notice of deficiency properly sent to petitioner by certified mail at his last known address is effective notwithstanding an assertion that it was not received due to alleged mishandling by the Postal Service (Pet. App. A13-A14).

3. The court of appeals affirmed. The court noted that the mailing of a properly addressed deficiency notice commences the 90-day period for filing a petition in the Tax Court under the plain language of the statute, without regard to whether the notice was received (Pet. App.

A3). The court therefore concluded that the 90-day period in petitioner's case began on March 26, 1990, when the notice of deficiency was properly mailed to him by certified mail at his last known address, and expired 90 days later on June 26, 1990 (*id.* at A2-A3). The Tax Court therefore correctly dismissed the petition as untimely (*ibid.*).

ARGUMENT

1. Section 6213 of the Internal Revenue Code requires that a petition for redetermination of a tax deficiency must be filed with the Tax Court within 90 days after the notice of deficiency is "mailed." 26 U.S.C. 6213(a). Section 6212 of the Code provides that a notice of deficiency may be sent to a taxpayer "by certified mail or registered mail." 26 U.S.C. 6212(a). To provide a uniform and predictable method for issuing these notices, Congress further specified in Section 6212 that a notice, "if mailed to the taxpayer at his last known address, shall be sufficient" (26 U.S.C. 6212(b)(1)).

Applying the plain language of this statute, the courts of appeals have generally held that a notice of deficiency properly mailed to the taxpayer's last known address by certified or registered mail is valid without regard to whether the taxpayer actually received it. *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988); *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988); *Morse* v. *Commissioner*, 635 F.2d 701, 703 (8th Cir. 1980); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). See also *Berger* v. *Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969). Applying this rule, the court of appeals properly rejected petitioner's claim in this case. The uncontroverted evidence demonstrated that the IRS mailed the notice of deficiency to petitioner by certified mail, properly addressed

to him at his last known, and correct, address (Pet. App. A2, A8, A13).

2. Petitioner asserts (Pet. 9) that he did not receive the notice of deficiency because it was mishandled by the Postal Service. He claims that, under decisions in other circuits, the notice of deficiency was therefore invalid. *Id.* at 10, citing *Powell* v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, 113 S. Ct. 440 (1992); *McPartlin* v. *United States*, 653 F.2d 1185 (7th Cir. 1981); and *Keado* v. *United States*, 853 F.2d 1209 (5th Cir. 1988).

In *McPartlin*, the court stated that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayer due to error of the Postal Service, the notice shall be found insufficient." 653 F.2d at 1188. As other courts have recognized, however, that statement was dictum because the court concluded in *McPartlin* that the IRS had *not* sent the notice of deficiency to the taxpayer's "last known address" as required by Section 6212 (653 F.2d at 1187, 1190). See *Keado* v. *United States*, 853 F.2d at 1212 n.9. As we acknowledged in the government's petition for a writ of certiorari in the *Powell* case (92-452 Pet. 11 n.12), the decision in *McPartlin* thus does not afford a basis for concluding that a conflict among the circuits exists on this issue.

Petitioner's reliance on *Keado* is clearly misplaced. In that case, the Fifth Circuit rejected the argument made by petitioner here. 853 F.2d at 1211-1212, 1218-1219. The court further noted that the Seventh Circuit's dictum in *McPartlin* was inapplicable to the facts before the court in that case. *Id.* at 1212 n.9.[1]

[1] Petitioner's reliance (Pet. 11) on *Pyo* v. *Commissioner*, 83 T.C. 626 (1984), *Mulvania* v. *Commissioner*, 81 T.C. 65 (1983), and *Estate of McKaig* v. *Commissioner*, 51 T.C. 331 (1968), is misplaced. In two of those cases, the notice of deficiency did not comply with the statute because it was "sent to the wrong address." *Mulvania* v. *Commissioner*, 81 T.C. at 70. See also *Pyo* v.

It is true that the Fourth Circuit stated in *Powell* v. *Commissioner* that if "the notice was admittedly not delivered to the taxpayers because of an error of the Postal Service * * * that is sufficient proof on the part of the taxpayers that the notice was insufficient." 958 F.2d at 56. It is no longer clear, however, that *Powell* is accepted as a correct statement of the law in the Fourth Circuit. In *Balkissoon* v. *Commissioner*, 995 F.2d 525 (1993), the Fourth Circuit endorsed the generally accepted rule that a notice of deficiency is "sufficient" if it is mailed to the taxpayer's last known address (*id.* at 528):

> Section 6212(a) does not require that the taxpayer actually receive the notice of deficiency. Instead, the Commissioner must show only that it sent a notice by registered or certified mail to the taxpayer's last known address.

The court emphasized that this "statutory scheme * * * provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer." *Ibid.*, quoting *Jones* v. *United States*, 889 F.2d 1448, 1450 (5th Cir. 1989). Even though *Powell* was cited to the court in the *Balkissoon* case, the Fourth Circuit applied the generally accepted rule that a notice of deficiency is sufficient if it is "mail[ed] to the taxpayer's last known address" (26 U.S.C. 6212(b)(1)) even if

Commissioner, 83 T.C. at 639. In *Estate of McKaig* v. *Commissioner*, 51 T.C. at 336, in stating that the Commissioner "should have known something was wrong" when the notice was returned undelivered, the court emphasized "that there [was] considerable doubt as to whether" the Commissioner had sent the notice to the correct address, as the statute requires. *Ibid.*

the taxpayer did not "actually receive" it. 995 F.2d at 528.

3. There is no merit in petitioner's additional contention (Pet. 13) that the 90-day period for filing a petition for redetermination of the deficiency runs only from the date that the notice was actually received. The statute clearly provides that the 90-day period commences on the date that the notice is "mailed" by the IRS. 26 U.S.C. 6213(a).

Petitioner errs in asserting (Pet. 13) that *Tenzer* v. *Commissioner*, 285 F.2d 956 (9th Cir. 1960), holds to the contrary. In *Tenzer*, the court found that the IRS had "abandoned" a deficiency notice that had been mailed to the taxpayer, but never received, because the IRS thereafter elected to effect personal service of the notice on the taxpayer. *Id.* at 956, 958. While the court held in *Tenzer* that a new 90-day period for the filing of a petition for redetermination commenced because of that "abandonment," the court acknowledged that the first notice, which had been "correctly addressed, registered and mailed," was "not wholly void" and "was probably good enough to arrest the statute of limitations" (*id.* at 958). In subsequent decisions, the Ninth Circuit has not derived from *Tenzer* any general rule that the 90-day period is to be dated from the receipt of the notice rather than from its mailing.[2] To the contrary, the Ninth Circuit has consistently applied the general rule that a notice of deficiency properly mailed to a taxpayer's last known address is valid without regard to whether the taxpayer actually received it. See, *e.g.*, *Williams* v. *Commissioner*, 935 F.2d at 1067; *Wilson* v. *Commissioner*, 564 F.2d 1317, 1319 (9th Cir. 1977), cert. denied,

[2] In the decision in *Tenzer* itself, the court acknowledged that it was open to "the charge * * * that we take liberties with the statute." 285 F.2d at 958.

439 U.S. 832 (1978); *Boren* v. *Riddell*, 241 F.2d 670, 672 (9th Cir. 1957).

Nor does the decision in the present case conflict with the Seventh Circuit's holding in *McPartlin* v. *Commissioner* that, when a "notice of a deficiency is not sent to the taxpayer's 'last known address,' subsequent actual notice of the determined deficiency will commence the running of the 90 day period." 653 F.2d at 1192. The Seventh Circuit emphasized in *McPartlin* that its holding was "based solely upon the peculiar facts and circumstances of this case." *Id.* at 1193. The principal difference between the facts of *McPartlin* and of the present case is that the deficiency notice in *McPartlin* was mailed to an address that was *not* the taxpayer's "last known address." See *id.* at 1187, 1190. In the present case, the deficiency notice was indisputably "mailed" to petitioner's "last known address." Under the plain language of the statute, the 90-day period for filing his petition in Tax Court commenced on the date that the notice was thus properly "mailed" to petitioner (26 U.S.C. 6213(a)). Because the Tax Court petition was filed long after that 90-day period expired, the court of appeals correctly held that it was untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

DAVID ENGLISH CARMACK
ANDREA R. TEBBETS
Attorneys

OCTOBER 1993

Supreme Court, U.S.
F I L E D
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NO. 93-305

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. BLANKSTYN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. BLANKSTYN
16213 SOUTH 35TH STREET
PHOENIX, ARIZONA 85044
(602) 759-9024
Petitioner, In Propria Persona

Date: November 16, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Notice of Deficiency is sufficient when the Notice, that was given under the provisions of IRC, Section6212(a) was not received until 383 days after the date of the Notice, due to Postal Service error in the delivery of the Notice.

2. Whether the 90-day period, provided for under the provision of IRC, Section6213(a), otherwise began to run upon actual receipt of the Notice of Deficiency, where the Notice was not received until 383 days after the date of the Notice, due to Postal Service error in the delivery of the Notice.

THE PARTIES

The only parties are those who appear in the caption of the case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, William C. Blankstyn, hereby submits this Reply Memorandum in Support of his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 19, 1993.

The statement for the location of the opinions from the lower court, the statement of this Court's jurisdiction and the statement of facts are fully set forth in the Petition.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WHICH FOUND THAT THE NOTICE OF DEFICIENCY WAS SUFFICIENT, WHEN EVIDENCE SHOWED THAT THE NOTICE WAS NOT RECEIVED DUE TO POSTAL SERVICE ERROR IN DELIVERY OF THE NOTICE IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURT'S OF APPEAL

The Petitioner argues that the Notice of Deficiency was not received by him due to Postal Service error in the mailing of the Notice. The Ninth Circuit, in rendering its decision in this case, placed itself in conflict with other circuits and the Tax Court, when it held that once the IRS mailed the Notice to the Petitioner's "last known address" it was sufficient to meet the requirements of IRC, Section 6212(a), whether the Petitioner received the Notice or not.

In every circumstance where error in delivery was beyond control of the taxpayer, the other circuits and the Tax Court have held that such an error rendered the Notice invalid. The most recent support for this

proposition was found in *Powell v. United States*, 958 F.2d 53 (4th Cir., 1992).

In response to the Petition, the Respondent argues that the Fourth Circuit's recent decision in *Balkissoon v. Commissioner*, 995 F.2d 525 (4th Cir., 1993) leaves doubt that *Powell* is correct statement of law in that circuit. (Res. Brf. at Page 6). The Respondent misrepresents the holding in *Balkissoon*.

In *Balkissoon*, the Commissioner mailed the Notice of Deficiency by regular first class mail. The Balkissoon's received the Notice and timely petitioned Tax Court. The issue was whether it was permissive or mandatory for the Commissioner to send the Notice of Deficiency via certified or registered mail. In concluding that IRC, Section 6212(a) made it permissive for the Commissioner to send the Notice via certified or registered mail, the Court stated as part of its holding that;

> "If the taxpayer actually does receive notice of deficiency by some method of delivery, the Commissioner's failure to comply with the authorization in section 6212(a) inviting the use of registered or certified mail proves to be a technical, but harmless violation.
>
> The circuits that have addressed this issue directly all have reached this conclusion, holding in essence that "a notice of deficiency that is actually received without delay prejudicial to the taxpayer's ability to petition

> the Tax Court is sufficient to toll the statute of limitations as of the date of mailing." *id.* at 528

The Fourth Circuit found that the Balkissoon's were not prejudiced by the fact that the Notice had been sent by regular mail, because they admittedly received the Notice and timely petitioned Tax Court. However, the Fourth Circuit left no doubt that the outcome would have been substantially different had the Balkissoons not received the Notice in time to petition the Tax Court.

It is clear that *Powell* and *Balkissoon* are distinguishable. The Petitioner submits that the Fourth Circuit would continue to affirm *Powell* if the facts before it show that there was prejudicial delay in the receipt of the Notice of Deficiency, where the delay was caused by circumstances beyond the control of the taxpayer, even if the Notice was mailed to the taxpayer's last known address.

The Respondent attemts to argue that *Pyo v. Commissioner*, 83 TC 626, 639 (1984); *Mulvania v. Commissioner*, 81 TC 65, 70 (1983), because the record showed that the Notices were sent to the wrong address. As the Petitioner pointed out in the Petition, *Pyo* and *Mulvania* are applicable for the "**general**" proposition that "If mailing ***does not*** result in **actual** notice of a tax deficiency, because 'the notice is sent to the wrong address and never delivered, ***or delivered with prejudicial***

delay, **the statutory purpose is not served** and it would be **manifestly unfair** to deny the taxpayer his prepayment hearing.'" (emphasis added). Thus, just as the *Balkissoon*, upon which the Respondent relies so heavily in its response to the Petition, has some application for the "**general**" propostion that a notice is sufficient if it is sent by certified or registered mail, even if it is not received by the taxpayer. *Pyo* and *Mulvania* are both applicable when evidence shows that the delivery of the Notice is delayed by circumstances beyond the control of the taxpayer, even if the Notice contains the proper address.

Upon summary of the facts of this case, which are set forth in the Petitioner's uncontroverted affidavit that was filed in the Tax Court[1], this Court will see that the Ninth Circuit's conclusion that the requirements of IRC, Sections 6212 and 6213 because the notice was 'mailed' to the Petitioner at his "last known address" is in conflict with at least the Fourth Circuit. The facts show that it was the Postal Service's mishandling of the 1985 Notice of Deficiency that resulted in the Petitioner's non-receipt of the Notice of Deficiency. They show that he received the Notice of Deficiency for 1986, but not for 1985. They also show that the notices for both years were mailed the same date, that the certified mail numbers

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1/ Appendix E, Attached to Petition.

were sequential, and that, although the Petitioner received the 1986 Notice of Deficiency, the Postal Service records showed that both the 1985 and 1986 Notices were returned to the Internal Revenue Service in Ogden, Utah with the "unclaimed" annotation. Thus, the facts show that there was "**prejudicial delay**" in the delivery of the Notice caused by Postal Service.

The Commissioner cannot claim total innocence in this case. As the Affidavit in Appendix E to the Petition at 6 shows, the Petitioner wrote to Marc Garcia with more than 30 days remaining on the petition time and asked if the Notice for 1985 had issued and if it had why had the Petitioner not received it. The Petitioner received no response from anyone.

Because the record shows that delivery was delayed by the Postal Service the 1985 Notice is either insufficient.

II. THE FAILURE OF THE TAX COURT AND APPELLATE COURT TO CONSIDER THAT THE 90-DAY PERIOD FOR PETITIONING THE UNITED STATES TAX COURT BEGAN UPON THE PETITIONER'S ACTUAL RECEIPT OF THE NOTICE OF DEFICIENCY IS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN SETTLED BUT SHOULD BE SETTLED BY THIS COURT

The record of this case also shows that the first time the Petitioner actually knew of the Notice of Deficiency was when he received it as an attachment to the Respondent's response to the Petitioner's Motion for Preliminary Injunction filed in the district Court in *Blankstyn v. United States*, CIV 91-0452 PHX CAM, District of Arizona.

In the alternative to declaring the Notice insufficient as set forth in Argument I, the Court should declare that the 90 day period for petitioning the Tax Court began to run upon the Petitioner's actual receipt of the Notice of Deficiency. In response the Respondent argued that the Court in *McPartlin* based its decision "solely upon the peculiar facts and circumstances of this case." *Id.* at 1193. The Petitioner submits that this case warrants the same consideration and the case should have been decided on the peculiar facts and circumstances which show that the non-receipt of the Notice of Deficiency was beyond the control of the Petitioner.

It should not have been decided on the "**general**" principal that the notice was valid because it was mailed to the "last known address." The general principal should be that "Notice is sufficient if it is mailed to the "last known address" and there is no prejudicial delay in the delivery. *McKay v. C.I.R.* 886 F.2d 1237, 1239 (9th Cir., 1989); *Mulvania v. C.I.R.* 769 F.2d 1376 (9th Cir., 1985); *Clodfelter v. Commissioner*, 527 F.2d 754, 756 (9th Cir., 1975).

CONCLUSION

The evidence shows that the Postal Service mishandled the Notice of Deficiency for 1985 resulting in the Petitioner's non-receipt of it. The circumstances were beyond the control of the Petitioner and were prejudicial to his rights. The district Court chose to ignore the facts and of the Postal Service's mishandling and rendered a decision in conflict with other circuits.

Under the peculiar facts and circumstances of this case this Court should either declare the Notice of Deficiency for 1985 invalid or in the alternative declare that the 90 day period began to run when it was actually received by the Petitioner.

Accordingly, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of November, 1993.

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